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22759

Supreme Court

OF THE

United States

OCTOBER TERM, 1902.

No. 190.

Southern Pacific Railroad Company *et al.*, *Appellants,*

vs.

The United States, *Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR UNITED STATES.

Statement.

This is an appeal by the Southern Pacific Railroad Company and others, from a final decree of the United States Circuit Court of Appeals, for the Ninth Circuit, [Record 2369, 2470], affirming a final decree of the United States Circuit Court for the Southern District of California, [Record 773, 774], as to certain lands in California, the title to which was quieted in the United States by the courts below, and being those lands embraced in odd-numbered sections within

the thirty-mile limits of the grant to the Southern Pacific Railroad Company, made by section 23 of the act of Congress, approved March 3, 1871, [16 U. S. Stats. 573, 579], so far as such lands fall within the twenty-mile limits of the grant by the same act of Congress, made to the Texas Pacific Railroad Company, as shown by the map of general route filed in October, 1871, and withdrawn on that date by orders of the Interior Department, and amounting to about five hundred and fifty thousand acres.

By the act of Congress approved February 28, 1885, (see appendix) the grant to the Texas Pacific Railroad was forfeited and the lands restored to the public domain for noncompletion of the railroad to be built by that company under the act of March 3, 1871.

Lands Embraced by this Appeal.

The lands embraced in this appeal are situated in the southeasterly corner of California, and are bounded on the east by the Colorado river, on the south by Mexico, on the west by the westerly thirty-mile limit of the Southern Pacific Railroad grant, as constructed and definitely located in the year 1878, between Los Angeles and Yuma, and on the north substantially by the third standard parallel south.

None of these lands have been patented by the United States to the Southern Pacific Railroad Company, but a large part of them have been entered under the general land laws of the United States, by numerous persons, it having been uniformly held by the Interior Department, that these lands were excepted from and not operated upon by the grant to the Southern Pacific Railroad Company.

The present suit is a consolidation of three separate suits, brought by the United States in the United States Circuit Court for the Southern District of California, against the

Southern Pacific Railroad Company and others, and numbered respectively 587, 662 and 675 on the docket of that court.

By stipulation of parties and order of court, these three suits were consolidated and a single amended bill of complaint was filed on May 26th, 1896, [Record 253, 254, 255].

Case 587 was brought in the Circuit Court against the Southern Pacific Railroad Company for the lands embraced in the present appeal to this court, [Record 42], as to which lands both of the courts below granted a decree quieting the title of the United States, [Record 773, 2469].

Case 675 was brought for those lands embraced within the limits of a location of the Texas Pacific Railroad Company, which that company attempted to make from Yuma on the Colorado, thence running northwesterly through the San Gorgonio Pass, and thence southerly to San Diego. Both of the courts below decided that the Texas Pacific Railroad had not perfected a definite location of its line by the San Gorgonio Pass, and awarded those lands to the Southern Pacific Railroad Company outside of those in case No. 587.

Case 662 was brought to cancel a patent to a quarter section of land which was in fact embraced within the limits of the San Gorgonio route limits of the Texas Pacific railroad, and which had been settled upon and entered by one Crawford, under the homestead laws, and which land upon a contest in the General Land Office, between the Southern Pacific Railroad Company and Crawford, had been awarded to Crawford upon the ground that his settlement antedated the indemnity selection of the Southern Pacific Railroad, but which land was erroneously patented to the Southern Pacific Railroad Company, pending the appeal of that company to the Secretary of the Interior, [Record 175].

As to this quarter section of land, the Circuit Court dismissed the bill and adjudged the title to be in the Southern

Pacific Railroad Company, but upon appeal by the United States the decree of the Circuit Court was reversed in this respect, and the patent of the Southern Pacific Railroad Company was vacated *by a supplemental decree of the Circuit Court of Appeals, upon the appeal of the United States in case No. 588 in that court, which is not a part of the record here,* [See Southern Pacific Railroad v. United States, 109 Fed. Rep. 913, at page 926], *and need not be brought up for consideration, as no appeal has been taken from the decree of the Circuit Court of Appeals as to this tract of land, as appears from the Petition for Appeal and Assignment of Errors,* [Record 2471, 2473].

No appeal has been taken by the United States from the decree of the court below, awarding to the defendants the lands on the San Gorgonio route outside of those embraced within the twenty-mile limits of the Texas Pacific general route map, which were withdrawn by the General Land Office, prior to the definite location of the Southern Pacific Railroad.

And no appeal has been taken by the defendants from the decree of the Circuit Court upon the appeal of the United States, involving the quarter section of land entered by Crawford as a homestead.

The only lands embraced by this appeal are those within the Texas Pacific Railroad 20 mile limits, map of 1871, and Southern Pacific 30 mile limits, for which suit was originally brought in case 587 and embraced within the bill filed in the consolidated suit [Record 256] and more particularly described in the first article of the decree [Record 775, 776] and described also in the assignment of errors of the defendants, [Record 2473, 2474].

The question presented upon this appeal is as to the ownership of these land involving the determination whether by the

map of general route filed by the Texas Pacific Railroad Company in 1871, and the orders of withdrawal of said lands by the Interior Department in 1871, and other acts of the Texas Pacific Railroad and decisions of the Interior Department, they were excepted from the grant to the Southern Pacific Railroad Company, which filed its map of definite location between Los Angeles and the Colorado river thereafter and in January, 1878.

The Southern Pacific map of definite location is not printed, but it is stipulated between counsel concerning the printing of this record, that "the fifth section of the Southern Pacific Railroad as located and constructed filed with the Secretary of the Interior, with the Commissioners' report, upon said section on January 17, 1878," shall not be printed unless required, but shall accompany the record as an original document [Record 2431, 2432].

The report of the Commissioners to examine the road, which accompanied the map of definite location and which shows when it was made and filed, is a part of the record [Record 1422, 1423, 1440].

The answer of the defendants alleges: "Thereafter and prior to January 31, 1878, the said company definitely located and constructed the entire railroad provided for in said act of March 3, 1871."

To the amended bill filed in the three causes as consolidated [Record 255, 256], the defendants answered to the merits, [Record 268-293].

Section 1 of the Act of March 3, 1871, provided for the incorporation of the Texas Pacific Railroad Company, and provided for the construction of a railroad upon a line described as follows:

"From a point at or near Marshall, county of Harrison, state of Texas; thence by the most direct and eligible route,

to be determined by said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona, to a point on the Rio Colorado, at or near the southeastern boundary of the state of California; thence by the most direct and eligible route to San Diego, California, to ship's channel, in the bay of San Diego, in the state of California, pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude, and is hereby vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act."

Section 12 of the act provided for a reservation of lands for the company upon filing a map of *general route*, and withdrawal of lands prior to the definite location or construction of the road, in the following language:

"Said company within two years after the passage of this act, shall designate the general route of its said road as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories and twenty miles within the state of California, to be withdrawn from pre-emption, private entry and sale."

Section 9 of the act made a grant to the company in the following language:

"That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as such line may be adopted by said company, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad

in California where the same shall not have been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If, in the too near approach of the said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest the line of said railroad, may be selected as above provided; and the word 'mineral,' where it occurs in this act, shall not be held to include iron or coal; *Provided, however*, That no public lands are hereby granted within the State of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the lands originally granted. The term 'ship's channel, as used in this bill, shall not be construed as conveying any greater right to said company to the water front of San Diego Bay than it may acquire by gift, grant, purchase, or otherwise, except the right of way as herein granted; *And provided further*, That all such lands so granted by this section to said company, which shall not be sold or otherwise disposed of as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by, and paid to, said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

Section 23 of the act of March 3, 1871, under which the Southern Pacific Company and its assigns claim title to these lands, is in the following language:

"Sec. 23. That, for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six. *Provided, however, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company.*"

The material parts of the act of July 27, 1866, above mentioned in the act of 1871 are as follows:

"Sec. 3. *And be it further enacted:* That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state; and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by the plat thereof, filed in the office of the Com-

missioner of the General Land office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; *Provided, further*, That the railroad company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act; *Provided, further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act; and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided; *And provided further*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal; *And provided further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.'

"Sec. 18. *And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco; and shall have a uniform guage and rate of freight or fare with said road, and in consideration thereof,

to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided; and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

Texas Pacific Maps and Withdrawals.

The Texas Pacific Railroad, in compliance with section 12 of its grant, filed, on August 15, 1871, a map of its general route, from a point in Texas, to the Bay of San Diego, showing the line of route by what has been designated in this case as the "direct route" [Record 1545, 1546, 1548].

This map was received by the Interior Department and on September 27, 1871, by order of the commissioner of the general land office, all of the odd-numbered sections within twenty miles of the general route of the Texas Pacific Railroad were withdrawn and reserved [Record 1539, 1540, 1542].

That executive order and reservation remained in force and effect until after the grant was forfeited by the act of February 28, 1885, and until many years after the map of definite location of the Southern Pacific Railroad Company was filed.

The Texas Pacific Railroad Company was required, by section 9 of its charter, to definitely fix its line of road.

In further compliance with its charter, the Texas Pacific Railroad Company reported on July 1, 1874, to the secretary of the interior, *a description of the lines of route surveyed and fixed upon for construction, including a full and particular description of the line of route between Fort Worth, Texas, and San Diego, via the San Gorgonio pass.* [Record 1761, 1770.]

On June 30, 1876, the Texas Pacific Railroad filed in the

interior department, with its annual report, a small map showing the main and branch lines of its road and connections, including its line of railroad from the Colorado river at Yuma, via the San Gorgonio pass, to San Diego [Record 1772, 1774].

No action was taken by the interior department upon the San Gorgonio pass line of the Texas Pacific Railroad, other than to file the annual reports of the company and the map above mentioned, and no other maps were filed by that company, other than those two.

The San Gorgonio pass line has been protracted upon a plat showing 20, 30, and 40-mile limits, of the Texas Pacific and also showing the Southern Pacific route as definitely located with 20 and 30 mile limits, by Samuel G. Bennett for the government, which plat shows that the lands embraced by this appeal are not only within the limits of the Texas Pacific grant upon the San Gorgonio route, and the 20 mile limits of the general route map of the Texas Pacific, but also within the limits of the grant claimed by the Southern Pacific [Record 2093, 2098].

The lands decreed to the United States by the courts below, and as to which this appeal is taken by the Southern Pacific Railroad Company, and the other defendants, are embraced within the 20 mile limits general route map filed by the Texas Pacific Railroad on August 15, 1871, and which lands by section 12 of the act of March 3, 1871, were by operation of law upon the filing of said map, withdrawn from *pre-emption, private entry and sale.* These lands are also embraced in the order of the commissioner of the general land office of September 27, 1871, by which they were withdrawn from *pre-emption, homestead entry, private entry, and sale.* These lands are also embraced within the thirty-mile limits of the line of route surveyed and described in the re-

port of the Texas Pacific Railroad Company to the secretary of the interior on July 1, 1874, as a line surveyed and fixed upon for construction, from the Colorado River to San Diego by way of the San Gorgonio pass.

Southern Pacific Maps.

The Southern Pacific Railroad Company, claiming a grant of lands by section 23 of the act of March 3, 1871, filed on April 3, 1871, a map of its general route from Tehachapi pass, via Los Angeles, to the Colorado river at a point near Yuma. The map is certified on its face by the president of the company to be a map of *general route,* and it was received and filed as such by the commissioner of the general land office [Record 1362, 1363].

As it is sometimes pretended by the Southern Pacific Company that this map of 1871 is not a map of general route, but a map of definite location, the attention of the court is at this time particularly invited to the fact that the map is certified on its face by the president of the company to be a map of general route, and that it was filed and treated by the commissioner of the general land office as a map of general route.

It has been adjudged repeatedly in former litigations, that this particular map is a map of general route only.

United States v. Southern Pacific Railroad Co., 146 U. S., 570, at pages 599, 600, 601, 602, 603.

Southern Pacific Railroad v. United States, 168 U. S. 1, at page 42.

Southern Pacific Railroad v. United States, (C. C. A.) 98 Fed. 27, at page 29.

The Southern Pacific Railroad filed in five sections its map of constructed and *definitely located railroad* between Tehachapi pass and Yuma on the Colorado during the years from 1874 to 1878.

The three sections from Los Angeles to Yuma were filed as follows [Record 2430, 2431]:

Second section—From Spadra to R. 1 W., S. B. M. Filed November 8, 1875.

Third section—From R. 1 W. to R. 7 E. Filed July 10, 1876.

Fifth section—From R. 7 E. to Yuma. Filed January 17, 1878.

As these maps of definite location were filed, the limits of the grant were definitely adjusted and plats of definite withdrawal were prepared and filed in the local United States land offices.

These maps are certified by the officers of the company as correctly showing the line of its route as finally located and constructed and are a part of the record in the cause as original documents, but are not printed, in pursuance of a stipulation of counsel that they shall not be printed unless required, it being stipulated that the "* * * section of Southern Pacific railroad as located and constructed, filed with the secretary of the interior with the commissioner's report upon said section," shall not be printed [Record 2430, 2431]. That these sections embraced the lands in controversy appears from the commissioners' report [Record 1422, 1423, 1440].

We, therefore, have the date of definite location of the Southern Pacific railroad through the lands in controversy, to-wit, *January*, 1878.

Lands Claimed by Defendant, Colorado River Irrigation Company.

On December 8, 1893, the Southern Pacific Railroad Company, entered into a contract with defendant, Colorado River Irrigation Company, by which the railroad agreed, upon certain terms and conditions, to sell to the irrigation company a large part of the lands embraced by the bill in this case, which are roughly shown by a map attached to the contract, and described as follows:

Being bounded "on the south the international line separating California from Mexico; on the north the railroad station at Indio, in Riverside county, California; on the east and west, the east and west branches of the canals of said Colorado River Irrigation Company, as finally surveyed and located by said party of the second part, and generally designated by the annexed map marked 'A' and made a part hereof." [Recorded 859-870].

Nothing was paid down upon this contract at the time of its execution, and nothing has since been paid in money, but it is contended by the irrigation company that it has expended considerable amounts in the acquisition of rights of way and for construction in connection with a general scheme for irrigation of land in California and in Mexico, and embracing, as a part of the scheme, the lands covered by this contract [Record 2167, 2177, 2178].

The principal object of this contract, as set forth in the contract itself, in the third paragraph thereof, appears to have been to employ the irrigation company, in consideration of one dollar and twenty-five cents per acre deducted from the purchase price, to procure from congress the passage of an act to confirm the title in the Southern Pacific Railroad, or its assigns, to these lands, in view, doubtless, of the fact that these lands were reserved for the Texas Pacific Railroad Com-

pany, and excepted out of the grant to the Southern Pacific, as decided in the interior department in the decision of Secretary Lamar of November 2, 1885 [Record 1549, 1559].

Both of the courts below decreed all of these lands to the United States, [Record 773, 2469].

None of these lands were patented by the United States and the courts below by their decrees adjudged in effect that the Colorado River Irrigation Company had no title to them *and it was perpetually enjoined from having or claiming any right, title or interest to any of them.* [Record 775].

POINTS AND AUTHORITIES.

FIRST.

These lands which were set apart and reserved by the provisions of Section Twelve of the Act of March 3, 1871, and embraced by the general route map of the Texas Pacific Railroad and reserved by executive orders on September 27, 1871, cannot be operated upon or taken by the Southern Pacific Railroad Company under its grant of same date.

The grants to the Texas Pacific and to the Southern Pacific Railroads, being by the same act, if the respective rights of each had not been fixed and their priorities determined by the act, each company would have been entitled to an undivided moiety, their rights and equities in that case would have been equal.

Chicago Railroad v. Sioux City Railroad, 117 U. S. 406;
Southern Pacific Railroad v. United States, 183 U. S., 519.

It is well settled in the construction of grants of public lands and franchises, that where any doubt or ambiguity exists, it should be resolved in favor of the public and the state and construed most strongly against the grantee.

Leavenworth Railroad v. United States, 92 U. S. 733, 740;

Siddell v. Grandjean, 111 U. S. 412, 437, 438;

Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 562;

Atlantic and Pacific Railroad v. Mingus, 165 U. S. 413, 429.

In construing the act of March 3, 1871, we find at the outset that section 9 of the act made a grant to the Texas Pacific Railroad Company in fee and *in praesenti* of *"every alternate section of public land * * * * * designated by odd numbers to the amount of * * * * * ten alternate sections of land per mile on each side of said railroad in California * * * * * ."*

By section 23 of the same act a grant is made to the Southern Pacific Railroad Company which conflicts with that made by section 9 to the Texas Pacific Railroad, but to remove any question of conflict and so that effect may be given to all the parts of the act, and so that the rights and priorities of the respective roads may be defined, we find that it is provided by section 23, making a grant to the Southern Pacific Railroad Company, as follows:

"Provided, however, that this section shall in no way affect or impair the rights present or prospective of the Atlantic and Pacific Railroad Company, or any other railroad company."

The late Mr. Justice Lamar, when secretary of the interior, had no difficulty in construing this act and in his decision of November 2, 1885, adopting the opinion of Assistant At-

torney-General Montgomery, he held that it was not the intention of Congress to grant to the Southern Pacific Railroad Company any of the lands falling within the twenty-mile limits of the Texas Pacific Railroad as withdrawn by the interior department upon the map of general route in 1871, and that the proviso of section 23 above quoted, clearly excepted those lands from the operations of the Southern Pacific grant, [Record 1549, 1559].

Texas Pacific Railroad Company and Southern Pacific Railroad Company, 4 L. D., 215, 220.

And in that decision it is said:

"In order to determine what construction it is proper to give to the granting clause of section 23 of the above act of March 3, 1871, let us consider the legal rules laid down by the Supreme Court of the United States for the interpretation of granting acts of this character. In the case of the 'Dubuque and Pacific Railroad Company v. Litchfield' (23 Howard, 88), the Supreme Court says:

" 'All grants of this description are strictly construed *against the grantees;* nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of congress, the donation stands on the same footing as a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed they cannot be implied." * * *

"The same rule of construction as that above laid down in 23d Howard has been again and again reiterated by the Supreme Court of the United States—notably in the case of the Leavenworth, Lawrence & Galveston R. R. Co. v. the United States (92 U. S., 740). * * * * * *."

"As we have seen, the closing words of said section 23 of the act above quoted—the section under which the Southern Pacific Company claims the lands in question are as follows:

" '*Provided, however, That this section shall in no way affect*

or impair the rights, present or prospective, of the Atlantic and Pacific Company, or any other railroad company.'

"Now in view of the fact that this same act, in its preceding sections, had already declared that the 'Texas Pacific' was thereby constituted an incorporated railroad company, and was granted certain lands; including *all* the odd-numbered sections now in dispute, it is difficult to see how it would have been possible more clearly to except said lands from the operation of said grant to the Southern Pacific, than by providing that the latter grant should not 'affect or impair the rights, present or prospective, of any other railroad company." * * * * *

"If the act of Congress under which the Southern Pacific Railroad Company claims its grant had been a penal statute, where every intendment must be taken most strongly against the government, instead of a statute granting lands, where every intendment must be taken *most strongly against the grantee* and *in favor* of the government; * * *"

"But it can scarcely be presumed that congress, while in the very act of incorporating the Texas Pacific Railroad Company, and granting to it certain lands in order to enable it to work out the objects of its creation, could have intended to exclude it from the beneficial effects of a clause specifically declared to be for the protection of the rights of the Atlantic and Pacific Railroad Company *'and all other railroad companies,'* against all claims of the Southern Pacific based upon section 23 of the aforesaid act."

"Again: It is a recognized rule of construction, alike application both to statutes and to contracts, that where one construction will give force and effect to every part of a statute—or of a contract—while a different construction would produce a conflict between different parts thereof, the former construction must be adopted. And in this case it is clear that if we so construe said section 23 as to make it pass to the Southern Pacific Railroad Company *any* of the odd-numbered sections of land within the grant limits of the Texas Pacific, such a construction would bring said section into palpable conflict with section 9 of the same act

whereby *all* the odd-numbered sections within said limits were granted to the Texas Pacific. If, however, we give to said *proviso* embodied in section 23 its literal meaning as above suggested, no such conflict will be found; and all the parts of said act will stand in perfect harmony with each other."

Pursuant to that decision of Secretary Lamar, in 1885, those lands were restored to the public domain and entries under the general settlement laws and other general land laws, have ever since been allowed to a large number of persons, and embracing a large part of these lands.

The decision of Mr. Justice Lamar of 1885 has been subsequently adhered to in the interior department.

This construction of the act of 1871 by the interior department so long acted upon and under which rights of a very large number of persons have attached, will not be disturbed, unless clearly erroneous.

In United States v. Philbrick, 120 U. S., 52, 59, the court said:

"A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned. See Hahn v. United States, 107 U. S. 405, and Brown v. United States, 113 U. S. 571, and authorities cited in each case."

In Hastings, etc., Railroad Co. v. Whitney, 132 U. S. 357, 366, Mr. Justice Lamar, speaking for the court, said:

"The conclusion at which we have arrived is in harmony with the later rulings of the Land Department. See Graham v. Hastings & Dakota Railroad (this case), 1 Land Dec. 380; St. Paul, &c., Railway v. Forseth, 3 Land Dec. 457; So. Minn. Railway v. Gallipean, 3 Land Dec. 166; Hastings & Dakota Railway v. United States, 3 Land Dec. 479; St. Paul, &c., Railway v. Leach, 3 Land Dec. 506; Hastings & Dakota

Railway v. Whitall, 4 Land Dec. 249; and many others of like tenor and effect.

"It is true that the decisions of the land department on matters of law are not binding upon this court, in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. In United States v. Moore, 95 U. S. 760, 763, this court said: 'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. * * * * *'

" 'The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.' See also Brown v. United States, 113 U. S. 568, 571, and cases there cited; United States v. Burlington, &c., Railroad, 98 U. S. 334, 341; Kansas Pacific Railroad v. Atchison Railroad, 112 U. S. 414, 418."

To a similar import are numerous other decisions of this court including the following:

United States v. Alabama Railroad Company, 142 U. S. 615, 621;

Hewitt v. Schultz, 180 U. S. 139, 149, 151, 156.

In the latter case the court said:

"Of course if the ruling of that office was plainly erroneous, it would be the duty of the court to give effect to the will of Congress, for it is the settled doctrine of this court that the practice of a department in the execution of a statute is material only when doubt exists as to its true construction;" and the court further said:

"That in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, it will look with disfavor upon any sudden change whereby

parties who have contracted with the government upon the faith of such construction may be prejudiced."

In the more recent case of Southern Pacific Railroad v. United States, 183 U. S., 519, 525, 527, 528, the court adhered to the decision of Mr. Justice Lamar, when secretary of the interior, construing the act of congress of July 27, 1866, as granting to the Atlantic and Pacific Railroad and Southern Pacific Railroad, equal moieties in the common place limits.

In Southern Pacific Railroad Company v. Bell, 183 U. S. 675, 681, the court adhered to the construction of the interior department in holding that no title passes to railroad indemnity lands until selected and such selection had been approved, and in holding that the term "land hereby granted" did not embrace lands within the indemnity limits of railroad grants and in that case the court said:

"The same question arose in Northern Pacific Railroad v. Davis, 19 Land Dec. 87, and in Northern Pacific Railroad v. Ayers, wherein Secretaries Smith and Francis expressed their concurrence in the views announced by Secretaries Lamar and Vilas.

"The court rested its decision largely upon this concurrence of views and long continued practice of the land department, and summed up its opinion in the following words: 'If this were done,' (that construction overthrown,) 'it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired under the pre-emption and homestead law, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed * * * * * If the practice in the land department could, with reason, be held to be wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2, 1864.'"

It is contended on behalf of the government in the present case, that the provision in section 23 of the act making the grant to the Southern Pacific Railroad Company that "this section shall in no way affect or impair the rights present or prospective * * * * * of any other railroad company," is a clear and comprehensive declaration by congress fixing the priorities of the two roads, and operates to wholly exclude from the Southern Pacific Company any right to any lands to which the Texas Pacific Railroad Company, or any other railroad company had either a present or *prospective* right, and that these lands which are embraced by the twenty-mile limits of the Texas Pacific general route map of 1871, which were reserved to that company by the provisions of section 12 of the act of March 3, 1871, and which lands were expressly reserved and withdrawn by executive orders for the benefit of that company, are lands to which the Texas Pacific Railroad Company had, if not a *present* right, at least a *prospective* one. This was the view of both courts below, and as before shown, has been the view and construction adopted by the interior department for at least seventeen years, during which period the whole public have been allowed to enter these lands as a part of the public lands of the United States.

The precise question here presented, we think has been determined by this court in United States v. Southern Pacific Railroad Company and United States v. Colton Marble and Lime Company, 146 U. S., 615, 619, in which this court pointed out that whatever may be the rule with respect to conflicts between other land grants, that this provision was specially inserted in the Southern Pacific grant in order to determine the priorities in case of conflict, and in which case the court said: (146 U. S. 616, 617.)

"One thing which distinguishes the grant of 1871 to the Southern Pacific Railroad Company from most, if not all

other, land grants is the proviso somewhat considered in the opinion in the former cases, and which reads:

"'Provided, however, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company.'

"What is the significance of this proviso? Without it, certainly the Southern Pacific, its grant being of later date, would be postponed to the Atlantic and Pacific; and on the filing by each company of a map of definite location, the title to the lands within the granted limits would vest in the Atlantic and Pacific Company, to the total and absolute exclusion of all claims on the part of the Southern Pacific. The proviso, therefore, was without significance, in respect to such lands. It in no manner strengthened the title of the Atlantic and Pacific, and took nothing away from the Southern Pacific. Yet it cannot be supposed that this proviso was meaningless, and that congress intended nothing by it. Carefully inserted, in a way to distinguish this grant from ordinary later and conflicting grants, it must be held that congress meant by it to impose limitations and restrictions different from those generally imposed in such cases, *and it in substance declared that the Southern Pacific Company should not in any event take lands to which any other company had at the time a present or prospective right.*"

The Circuit Court of Appeals for the Ninth Circuit expressed the following views concerning the proper construction to give to this proviso, [Record 2449, 2450; 109 Fed. Rep. 917]:

"Had the Texas Pacific Railroad Company, or any other railroad company, acquired any *present* or *prospective* right to any of the lands embraced in this suit at the time the grant was made by the government to the Southern Pacific Railroad Company, March 3, 1871? The answer to this question will dispose of the appeal taken herein by the Southern Pacific Company, and will be found in the opinion of the court in U. S. v. Colton Marble & Lime Co., 146 U. S.

615, 13 Sup. Ct. 163, 36 L. Ed. 1104. It is true that in that case the court confined itself to the conflicting claims of the Southern Pacific and the Atlantic & Pacific Company; but, by reference to the proviso in the grant to the Southern Pacific, it will be seen that it also includes 'present or prospective' rights of *'any other railroad company;'* and it therefore necessarily follows that the views expressed by the Supreme Court in that case apply with equal force to the conflicting claims, if any, between the Southern Pacific and the Texas Pacific, because whatever rights the Texas Pacific Company ever acquired to any of the lands in question continued to exist until the act of forfeiture passed by congress February 28, 1885, and as long before that time the Southern Pacific Company had built the road it was authorized to construct, and filed in the general land office maps showing its definite location, it necessarily follows that if at the latter date the lands in suit, or any of them, were for any reason reserved, or were lands to which the Texas Pacific Company had acquired a present or prospective right, such lands did not pass to the Southern Pacific Company under its grant. For as to such lands the Texas Pacific Company certainly had a 'prospective,' if it did not have a 'present right.' Inasmuch as the grants to the Southern Pacific and Texas Pacific Railroad Companies were given by the same act, and of the same date, the ordinary and usual rule would be to give each of said companies one-half of such lands as were within both grants. But the case under consideration is taken out of the ordinary rule by the proviso annexed to the grant to the Southern Pacific Company."

On behalf of the government, it is not contended here that the bare filing of a map of general route alone would, under ordinary circumstances, confer upon any railroad company a vested right to lands embraced within the limits of the grant claimed thereunder. Neither is it contended that if Congress had shown an intention to do so that it could not have granted

by a later act lands falling within the limits of a grant embraced by a map of general route.

What we do claim is that the filing of a map of general route by a railroad company, together with a legislative and executive withdrawal, confers upon that company a *prospective right* to the lands within the limits described.

A "prospective right" is different from a vested right in this, that the word "prospective" is defined in the dictionaries as "being still in the future or in expectation; anticipated; marked by foresight, as a prospective scheme or mind."

It must then be admitted that the Texas Pacific Railroad had a *prospective* right to those lands which it reasonably expected or hoped to acquire under its grant, and that by the proviso "Congress meant to impose limitations and restrictions different from those generally imposed."

Not only did the Texas Pacific Railroad acquire a *prospective* right to the lands by filing its map of general route, but it acquired something more than that; it secured, while but an *imperfect* and *inchoate* right, still a *right* to the lands which could be asserted against third parties.

In Northern Pacific Railroad v. Sanders, 166 U. S. 620, 634, 635, 636, the Court said:

"The company acquired by fixing its general route only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper."

The right of the company, then, was an "inchoate right," subject to be defeated by the will of congress, but still a *right* which would properly be something more than a *prospective* right.

In United States v. Oregon and California Railroad Co., 176, U. S. 28, the court quoted with approval what was said in Northern Pacific v. Sanders, and further held that where congress had shown an *intention* to do so that the mere filing of a general route map did not prevent congress from disposing of the lands embraced thereby by later act granting lands to another road. In the latter case there was no legislative reservation or executive order withdrawing or reserving the land of any kind or nature, and the court said (176 U.S. 54)

"There never was any withdrawal of indemnity lands on the proposed line of the Northern Pacific Railroad Company between Wallula and Portland, nor was there any definite location or construction of its road opposite to the lands in suit."

The court was there dealing with a case where congress had expressed an intention, a purpose, to grant those lands to the Oregon Railroad, *and they had not been withdrawn or reserved.*

In the present case congress has declared that those lands to which the Texas Pacific Railroad had a present or prospective right shall not be taken by the Southern Pacific.

Effect must be given to the intention of congress.

Missouri Railroad v. Kansas Railroad, 97 U. S. 491, 497.

United States v. Southern Pacific Railroad, 146 U. S. 570, 619.

In Missouri Railroad v. Kansas Railroad, *supra,* the court said:

"It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress. That intent should not be defeated by applying to the grant the rules

of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will."

It has been decided again and again that the withdrawal of lands on general route maps is for the purpose of preserving the grant for the company to be aided.

Buttz v. Northern Pacific, 119 U. S. 55, 72.

St. Paul Rd. v. Northern Pacific, 139 U. S. 1, 17, 18.

Northern Pacific v. Musser-Sauntry Land Co., 168 U. S. 604, 607.

Certainly effect can be given to the intention of Congress, and in filing the map and issuance of withdrawal orders a *prospective* if not a present right was conferred upon the Texas Pacific.

(*b*) The grant to the Southern Pacific was only of those odd-numbered sections of public land to which the United State had

"full title, *not reserved*, sold, granted or otherwise appropriated, and *free from pre-emption or other claims* or rights at the time the line of said road is designated by a plat thereof filed * * *."

By a long line of decisions, and with no ruling to the contrary, it has been maintained as a settled doctrine that lands *reserved* by executive orders are not operated upon by a subsequent grant in aid of a railroad or other public improvement.

Wolcott v. Des Moines Co., 5 Wall. 681;

Wolsey v. Chapman, 101 U. S. 755;

United States v. Missouri Railroad, 141 U. S. 374;
Hamblin v. Western Land Co., 147 U. S. 531, 536;
Wisconsin Railroad v. Forsythe, 159 U. S. 46, 54;
Northern Pacific R. R. Co. v. Musser-Sauntry Land Co., 168 U. S. 604.

The act of congress, under which the Southern Pacific claims title, having determined the rights and priorities of the respective roads, it cannot be open to doubt but that so far as the Texas Pacific grant is concerned, the Southern Pacific grant is a junior one, and must be treated as subordinated to the other.

The Southern Pacific Company filed its map of definite location in *1878*, and the withdrawal was made for the Texas Pacific Railroad in *1871*, and the reservation was in full force when the Southern Pacific filed its map of definite location.

In Northern Pacific v. Musser-Sauntry Co., 168 U. S. 604, at page 611, the court said:

"When a withdrawal of lands within indemnity limits is made in aid of an earlier land grant, and made prior to the filing of the map of definite location by a company having a later grant—the latter having such words of exception and limitation as are found in the grant to the plaintiff—it operates to except the withdrawn lands from the scope of such later grant."

This decision, supported by a score of former ones, has not been overruled or qualified by any other case.

The case of United States v. Oregon Railroad, *supra*, has no application to the present case or to the Musser-Sauntry case, for the reason that in that case there was no reservation or withdrawal of lands, as in the present case, and for the further reason that here the intention of congress, not to grant these lands to the Southern Pacific, but to reserve them for the Texas Pacific, is manifest.

SECOND.

Lands reserved by section twelve, Act March 3, 1871, for Texas Pacific Railroad and covered by its map of 1871, and withdrawn by executive orders, cannot be taken by the Southern Pacific as indemnity.

Some of the lands embraced by the decree of the courts below, and from which this appeal is taken, are lands falling within the twenty-mile limits of the Texas Pacific Railroad, as located by the map of 1871, and withdrawn for that company and intersected by the *indemnity limits* of the grant to the Southern Pacific Railroad Company, and it is now contended by the Southern Pacific that if it cannot take lands within its place limits, by reason of the *present or prospective right*, to them of the Texas Pacific Railroad, that yet it may select them as *indemnity* to supply deficiencies within the place limits of the Southern Pacific grant.

All that has been said by the interior department, by the courts below, and by this court, as to the effect to be given to the proviso of section 23, applies with equal force to any claim made to them by the Southern Pacific, either as granted lands or as indemnity lands.

The construction given by all of the courts and by the interior department to the proviso of section 23, is, *"that the Southern Pacific Company should not in any event take lands to which any other company had at the time a present or prospective right."*

The present contention of the Southern Pacific Company was elaborately pressed by that company in Southern Pacific Railroad Company v. United States, in 168 U. S. 1, 66, concerning lands within the *indemnity* limits of the Southern Pacific grant and within both the place limits and *in-*

demnity limits of the Atlantic and Pacific grant, but the court denied the contentions of the Southern Pacific Company and affirmed the decrees of the two courts below quieting the title of the United States to such lands and perpetually enjoining the Southern Pacific Company from claiming them.

In that case the court said: (168 U. S. pp. 46, 47.)

"The lands now in controversy are situated opposite to and are conterminous with the first, second and fourth sections of the Southern Pacific Railroad as constructed between 1873 and 1877, inclusive, and within the primary and *indemnity limits* of the grant to the Southern Pacific Railroad Company made by the 23d section of the Texas and Pacific act of March 3, 1871; the 61,939.62 acres patented to that company being opposite to the first and fourth sections of its road. It may be said that the lands here in dispute belong to one or the other of the following classes: Lands within the common granted limits of both the Atlantic and Pacific grant of 1866 and the Southern Pacific grant of 1871; lands within the granted limits of the Southern Pacific grant; and the indemnity limits of the Atlantic and Pacific grant, *lands within the Southern Pacific indemnity limits and the Atlantic and Pacific granted limits; lands within the common indemnity limits of both grants.* Of these in dispute 219,012.93 acres have not been surveyed by the United States."

In respect to all of these classifications of land, the court held in that case, 168 U. S., 62, "it must be for the reasons stated in the former decision that the United States is entitled as between it and the Southern Pacific Railroad Company to the relief given by the decree below."

The court there adjudged that none of those lands could be taken by the Southern Pacific as indemnity.

This construction of the court to the proviso of section 23 has been followed and adhered to by both the Circuit Court

and Circuit Court of Appeals, in the present case, and is in full harmony with the decisions of the interior department.

In Smead v. Southern Pacific Railroad, 29 L. D., 135, and in 26 L. D., 597;

Southern Pacific Railroad Co., 6 *id.* 816;

Moore v. Kellogg, 17 *id.*, 391-392;

Southern Pacific Railroad Company v. Moore, 11 *id.*, 534;

Southern Pacific Railroad Company, 15 *id.*, 460;

the interior department has decided that neither lands within the primary limits, nor the indemnity limits, of the Atlantic and Pacific grant can be selected by the Southern Pacific Railroad Company as indemnity.

This court has said that the Southern Pacific could not take *any land* to which another company had a *prospective right.*

It stands to reason that if the Southern Pacific Railroad Company cannot take these lands as granted lands, it should not permitted to take them as indemnity, because they are excluded from the Southern Pacific grant by reason of the intention of congress that they should not be taken at all.

Sioux City Railroad v. United States, 159 U. S. 349, and Chicago Railroad v. United States, 159 U. S., 372, 375, involved a similar question, in which latter case the court said:

"As decided in the other case, no part of the lands granted in aid of the construction of one road could be applied in aid of the other road. The act is to be interpreted as if congress by one act made a grant to the state in aid of the construction of the Sioux City road on the route designated, and, by another and separate act, passed at the same time, made a grant to the state in aid of the construction of the other road from South McGregor to a point of intersection within the Sioux City road * * * * * *."

"If, as matter of law and fact, these lands were never granted for the benefit of the Milwaukee road, but were granted in aid of the construction of the Sioux City road, and for no other purpose, they could never—consistently with the act of congress—have been used by the state for the benefit of the Milwaukee road. Sioux City & St. Paul Railroad v. United States, *ante*, just decided.

"It is, therefore, of no concern to the Milwaukee company, as the successor in right of the McGregor company, what was done with them by the state, nor whether the United States legally reacquired title to them as against the Sioux City company. It is in no position to question the decree on the original bill establishing the title of the United States as against the Sioux City company, and it is estopped by the decree in the suit which it brought to make any claim whatever to these lands. If, as has been conclusively adjudged, the Milwaukee company was without title or claim as against the Sioux City company, no rights could subsequently accrue to it by reason of the decree declaring that these lands reverted to the United States, by reason of the failure of the Sioux City Company and of the state to construct the road over the entire route from Sioux City to the Minnesota line. As these lands were set apart exclusively for the construction of the Sioux City road, no failure to construct that road by the state or by the corporation charged with the duty of building it, could, in any case, without the assent of congress justify their being applied in aid of the construction of another and distinct road."

Aside from the authority upon this question, as shown by the cases last above mentioned, the direct decisions of this court and of the interior department, in the construction of this proviso of section 23, holding *"that the Southern Pacific Company should not in any event take lands to which any other company had at the time, a present or prospective right,"* ought to remove every ambiguity and doubt as to the proper construction to be given.

Especially is this true where the public have for more than 17 years acted upon the construction given to this section by the interior department, by entering these lands as a part of the public domain, and where the decision of this court in 146 U. S. 615, 619, declaring the purpose and effect of this proviso, has been operative and unreversed for more than ten years.

The very recent case of Clark v. Herington, 186 U. S. 206, is upon principle decisive of the principle and in harmony with the cases above cited in which the court held that one road could not take as indemnity the *even* sections in the place limits of a grant to another road.

If the even-numbered sections cannot be taken as indemnity, there are much stronger reasons for holding that the odd-numbered sections which were granted to the other road, should not be taken.

In the present case the Texas Pacific grant being lands to which that company had a present or prospective right, were forfeited to the United States, and as this court has decided again and again, such forfeitures are for the benefit of the United States and not for the benefit of another company.

United States v. Southern Pacific Railroad, 146 U. S., 570; 146 U. S. 615; 168 U. S. 1.

The United States had the power to forfeit the Texas Pacific grant, and to devote that grant to another company to secure the construction of the road to San Diego, or to sell the lands and devote the proceeds for that purpose, or to dispose of the lands under other laws, as might be determined by Congress, and it was a matter of no concern to the Southern Pacific what the United States did with these lands. The grant to the Southern Pacific was not enlarged by reason of the forfeiture of the Texas Pacific grant, and if the lands

had not been forfeited they never could have been taken by the Southern Pacific Company under its grant.

THIRD.

The defendants Central Trust Company and D. O. Mills and Homer S. King, trustees, under the mortgages of the Southern Pacific Company, are not *bona fide* purchasers.

It was contended by counsel for defendants in the courts below, and is assigned as error here [Record 2476], that the defendants Central Trust Company, and D. O. Mills and Homer S. King, who were trustees in the several mortgages or deeds of trust, made by the Southern Pacific Railroad Company to secure bonds issued by that company, are bona fide purchasers of these lands.

This contention has no merit as an original proposition and has been frequently decided against the defendants in former litigations in this court.

(*a*) These instruments were executed to these trustees by the Southern Pacific Railroad Company to secure certain bonds issued by the railroad company, [Record 1155, 1160, and Record 1100, 1130].

In Perry on Trusts, Volume 2, section 602, *d.*, it is said:

"A mortgage is a pledge or security for a debt, whatever may be the form which the transaction takes, whether a simple mortgage deed in form, or a mortgage with a power of sale, or a deed in trust or a deed absolute on its face, accompanied by an agreement in writing to re-convey, or to sell, or to do any other thing upon the payment of a certain sum of money, courts of equity look upon it as a mortgage, and deal with it as such. The test in all these forms is this: Does the transaction resolve itself into a security for the payment of a sum of money or a debt, and until a default in the payment

of a sum of money or a debt, has the grantor any right to pay the money and keep or receive back the title to his property? And it is immaterial that the conveyance is made to a third person, and not to the creditor himself."

The act of Congress of March 3, 1887, relating to the adjustment of railroad grants and protection of bona fide purchasers, provides as follows:

"That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act." * * * * (24 Stats. 556.)

That provision of the act of 1887 is conclusive against the contention of the defendants.

(*b*) The mortgages or deeds of trust above mentioned, do not cover or embrace the lands in suit herein.

The descriptions in both mortgages are similar, and referring now to the description of the property mortgaged or conveyed by the deed of trust to the Central Trust Company, we find that the mortgage describes the lands as follows: "Also all and singular the several sections of land so as aforesaid granted by said acts of congress (acts of July 27, 1866, and March 3, 1871), and also all the estate, right, title, interest, claim and demand whatsoever at law or in equity of, in or to the same." * * * *

This instrument does not describe any tract of land, and purports only to embrace *those lands granted to the Southern Pacific Railroad Company by said acts of congress* and as the lands in suit here were excepted from the grant to the Southern Pacific Railroad Company, it necessarily follows that they are not, and cannot be embraced by the mortgage.

(*c*) In all of the former litigations between the United States and the Southern Pacific Railroad Company, and trustees under its mortgages, this court has uniformly held

that lands excepted from the Southern Pacific grant were not held by such trustees as bona fide purchasers.

United States v. Southern Pacific Railroad Co., 146 U. S. 570, 615, 619;

Southern Pacific Railroad Co. v. United States, 168 U S., 1, 66;

Southern Pacific Railroad Co. v. United States, 183 U. S. 519.

FOURTH.

Defendant Colorado River Irrigation Company is not a *bona fide* purchaser of and has no interest in any lands embraced by this appeal. The contract of sale by the Southern Pacific to that company is void as against public policy, being to procure enactment of a law by Congress to grant said lands to said defendants.

The joint and several answer of defendants Southern Pacific Railroad Company and Colorado River Irrigation Company [Record 268, 288] alleges that on December 8, 1893, the Colorado River Irrigation Company purchased in good faith for value, and without notice, from the Southern Pacific Railroad Company all of the lands described in the bill of complaint, bounded on the south by Mexico, on the north by the railroad station at Indio, and on the east and west by the east and west branches of the canals of said irrigation company, [Record 288].

The contract of December 8, 1893, and the accompanying map are in the record at pages 858, 870, and the map accompanying said contract as a part thereof, shows that the lands embraced by said contract comprise about 550,000

acres, and that about one-half of them, or about 275,000 acres, are situate south of the third standard parallel south, which parallel is substantially upon and along the northerly twenty-mile limits of the lands embraced in the map of the Texas Pacific Railroad of 1871, and withdrawn for that company.

So that upwards of 250,000 acres of the lands embraced by this appeal are covered by the contract of the Southern Pacific to the Irrigation Company and are claimed by the latter company.

The Irrigation Company never paid any money or other thing of value to the Southern Pacific for these lands or upon this contract, [Record 2167, 2175], but Mr. Hart, the attorney for the Irrigation Company, testifies that that company expended about $167,000 in procuring head works, rights of way and canal construction, to irrigate in part the lands embraced by said contract with the Southern Pacific and in part lands owned by the Irrigation Company in Mexico.

The map accompanying the contract [Record 870] shows that the Irrigation Company owned a larger body of land in Mexico than in California.

We feel entirely justified, from the record in this case, in saying that the contract from the Southern Pacific to the Colorado River Irrigation Company, is not only purely speculative and not in good faith, within the decision of this court, in United States v. Southern Pacific Railroad Company, 184 U. S., 49, 60, but further, that this contract is totally void as against public policy, it having been made for the purpose of procuring the passage of an act of Congress by the Irrigation Company, confirming or granting to the Railroad Company or the Irrigation Company, the title to all of the lands embraced by said contract, lying

south of the third standard parallel south and being those embraced by this appeal.

The expenditures claimed to have been made by the Irrigation Company, are equally for the benefit of the lands in California, or in Mexico, but if used only on California lands, it does not appear that the value of the canal would be lessened whether the Irrigation Company acquired title to lands under the contract with the Southern Pacific Railroad, or under other general laws of the United States, or sold the water to others as owners of lands, and in point of fact, the records of the Interior Department show that a large part of the lands embraced by this contract have been entered under various laws of the United States, other than the Southern Pacific grant of 1871, both prior and subsequent to the commencement of this suit.

None of the lands embraced by this appeal, as before stated, have been patented by the United States to the Southern Pacific Railroad Company, and the Circuit Court adjudged by its decree that the United States was the owner by title in fee simple, of all of these lands, [Record 774, 775], and this decree was affirmed by the Circuit Court of Appeals, but both courts below decided as appears from the opinions that the Colorado River Irrigation Company was a bona fide purchaser from the Southern Pacific Railroad Company of all patented lands [Record 841, 2468].

Both courts below by the decrees entered, *adjudged in effect*, as to the lands embraced in this appeal, and covered by the first paragraph of the decree [Record 775] that they had not been sold by the Southern Pacific Railroad Company in good faith to the Colorado River Irrigation Company.

The Colorado River Irrigation Company is now before the court upon this appeal claiming to be the owner of upwards of 250,000 acres of lands embraced by this appeal under its

contract of December 8, 1893, which we think is purely speculative and void upon its face, as being against public policy.

Nothing has been paid by the Irrigation Company to the Southern Pacific and no consideration has moved from one to the other. The entire purchase price with the accumulated interest thereon remains due and unpaid.

The contract concedes that the title to the lands was not in the Southern Pacific Railroad Company, and that a grant from the United States was necessary to make the title good.

Secretary Lamar had decided years before (4 L. D. 215) that these lands were excepted from the grant to the Southern Pacific and that decision had been uniformly followed.

The contract was purely a speculative one to cover a vast amount of lands which it was hoped to acquire either under the adjustment act of March 3, 1887, or under some future legislation.

In United States v. Southern Pacific Railroad Co., 184 U. S. 49, 60, the court said:

"Now while the statute (Act of March 3, 1887), is, as we have stated, remedial and to be liberally construed in order to carry out the purpose of its enactment, yet to sustain this purchase as one made in good faith would ignore the plainest provisions of law in respect to *bona fide* purchasers and would uphold almost any kind of speculative purchase." * * *

"It seems to us that the testimony plainly discloses a purely speculative transaction. Graves paid nothing. His agreement was, as he says, to protect the company in its title, or rather in its purchase money, and then he would make what he could over and above that. He was not buying with the purpose of owning the land, but was simply engaged in an effort to secure to the original purchaser from the railroad company the money which it had invested in its purchase, advancing, it is true, in that effort, some money in the way of

taxes and devoting his legal services to that end, and hoping to make a profitable speculation out of the matter."

We therefore submit with confidence that the Colorado River Irrigation Company cannot be deemed to be a bona fide purchaser of any of these lands within the meaning of the act of 1887.

(2) The contract between the Southern Pacific and the Irrigation Company is void as being against public policy.

The contract between the Southern Pacific Company and the Irrigation Company, by virtue of which the defendants here claim that the Irrigation Company is the owner of the lands embraced thereby, provides that the Southern Pacific Railroad Company, party of the first part, agrees to sell to the Colorado River Irrigation Company party of the second part, the tract of land above described, which amounts to about 550,000 acres at the price of $2.50 per acre [Record 859] and further provides that the party of the second part, the Colorado River Irrigation Company, agrees to buy the said lands and to pay therefor the sum of $2.50 per acre [Record 860], with interest thereon at six per cent per annum [Record 861], and by article four of said contract [Record 862] it is provided as follows:

"It is hereby agreed that if the United States' patents to the party of the first part (Southern Pacific Rd. Co.) shall not have been issued within ten (10) years from the date hereof for any of said lands lying south of the third parallel south, above described, and the party of the second part shall be enabled to secure said patents by reason of this contract, or if it should secure title by reason of any legislation applying to lands sold by railroad companies under the acts of Congress now existing, or that may be passed hereafter in relation thereto, then and in that event the party of the second part may deduct from the purchase price for said lands last above described the amount by it paid to the general government

for any of said lands, not exceeding one and twenty-five hundredths dollars ($1.25) per acre; *provided, however, that if the party of the second part shall obtain title to said lands in bulk by legislation existing, or that may hereafter be passed, then and in that event the party of the second part shall pay to the party of the first part the sum of one and twenty-five hundredths dollars* ($1.25) *per acre, irrespective of the amount paid to the general government.*"

Under this contract, if the Southern Pacific Company secures patents for the lands within ten years, under its grant, without the assistance of the Irrigation Company, and without that company securing any additional legislation, the price to be paid for the lands estimated at 550,000 acres at $2.50 per acre, amounts to $1,375,000.

About one-half of the lands contracted to be sold lie south of the third standard parallel south, and in case the Irrigation Company "*shall obtain title to said lands in bulk, by legislation, existing, or that may hereafter be passed, then and in that event the party of the second part shall pay to the party of the first part the sum of* $1.25 *per acre, irrespective of the amount paid to the general government,*" so that the deduction in the purchase price or the amount allowed by the railroad company to the Colorado River Irrigation Company, for securing such legislation, is to be, as estimated, $343,750.00.

The principle is well settled that the courts will not directly or indirectly lend their aid in the enforcement of, nor will they permit a recovery upon any contract, which is illegal or contrary to sound morals or public policy, and it is uniformly held that contracts to improperly influence legislation, or the acts of other public officers, are contrary to public policy and void.

In the present case the Irrigation Company is not an attorney, advocate or counsel. The title to the lands was in the

United States, and it was proposed and contemplated by the contract that the Irrigation Company should secure the passage of an act of Congress confirming title to the lands *in bulk*.

In Marshall v. Baltimore Railroad Company, 16 How., 314, 334, 335, it appears that Alexander Marshall brought an action to recover $50,000 for services upon a contract providing in part as follows: "That the right of Mr. Marshall to the compensation under the existing contract shall attach upon the passage of a law at the present session of the legislature, giving the right of way to Parkersburg, or to Fishing Creek, either to the Baltimore and Ohio Railroad Company, or to an independent company."

It further appeared from correspondence introduced in evidence, that Marshall was not to perform these services as an attorney or counsel in any proper manner by way of argument before a committee or otherwise, but that the services to be performed were in the nature of lobbying, and the court said:

"Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided." * * *

"Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors."

"Influences secretly urged under false and covert pretenses must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts."

In Tool Company v. Norris, 2 Wall. 45, 54, 55, the court said:

"The question, then, is this: Can an agreement for compensation to procure a contract from the Government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative."

* * * * * * * * * *

"The principle which determines the invalidity of the agreement in question has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question, whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions. Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception."

In Oscanyan v. Arms Co., 103 U. S. 261, at pp. 271, 277, the court said:

"The plaintiff claims that these contracts were procured through the recommendations which by his influence were made by Rustem Bey. His counsel stated this in his opening, and declared that no other person had possessed any influence in effecting the sales. It is for the use of this influence that the contract in suit was made and compensation is now demanded. The question then arises, Is this contract one which the court will enforce? We have no hesitation in answering it in the negative. The contract was a corrupt one,—

corrupt in its origin and corrupting in its tendencies. The services stipulated and rendered were prohibited by considerations of morality and policy which should prevail at all times and in all countries, and without which fidelity to public trusts would be a matter of bargain and sale, and not of duty.

"In the first place, the plaintiff was, at the time, an officer of the Turkish government. As its consul-general at the port of New York, he was invested with important functions and entitled to many privileges by the law of nations." * * *

"In any view of the contract here, whether it would be valid or invalid according to Turkish law and customs, it is intrinsically so vicious in its character and tendency, and so repugnant to all our notions of right and morality, that it can have no countenance in the courts of the United States."

McMullen v. Hoffman, 174 U. S., 639, 654, 656, 658, was a suit which arose upon a contract having its inception in an illegal and immoral agreement to procure a public contract by suppressing competition, and the court said:

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *Potior est condito defendentis.*" * * * *

"Upon the point as to the ability of the plaintiff to make out his cause of action without referring to the illegal contract, it may be stated that the plaintiff for such purpose cannot refer to one portion only of the contract upon which he proposes to found his right of action, but that the whole of the contract must come in, although the portion upon which he founds his cause of action may be legal." * * *

"'Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the ob-

jection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation'."

Upon the well settled principles stated in the foregoing cases in this court, and the numerous other cases therein cited, we submit that the contract between the Southern Pacific Railroad Company and the Colorado River Irrigation Company, under which the latter company claims title to half of the lands embraced in this appeal, asserting under such contract its ownership to a quarter million acres of land, is against public policy and absolutely void, and that the Irrigation Company cannot maintain its title under that contract to any of the lands embraced in this appeal, either under the grant by Congress of March 3, 1871, to the Southern Pacific Railroad Company, or under the act of March 3, 1887, protecting the rights of *bona fide* purchasers.

In conclusion it is submitted that the decrees of the courts below as to the lands embraced by this appeal, should be affirmed.

JOSEPH H. CALL,
Special United States Attorney.

APPENDIX.

ACTS OF CONGRESS.

ATLANTIC AND PACIFIC GRANT.

July 27, 1866, (14 Stat. 292).

AN ACT Granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast.

Section 1 incorporated the Atlantic and Pacific Railroad Company and provided for the construction and location of a line of railroad, as follows:

"Beginning at or near the town of Springfield, in the state of Missouri, thence to the western boundary line of said state and thence by the most eligible railroad route as shall be determined by said company, to a point on the Canadian river; thence to the town of Albuquerque on the river Del Norte, and thence by way of Aqua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific."

Section 2 grants a right of way, etc.

"Sec. 3. *And be it further enacted:* That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state; and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-

emption or other claims or rights, at the time the line of said road is designated by the plat thereof, filed in the office of the Commissioner of the General Land office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act; *Provided, further*, That the railroad company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act; *Provided, further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act; and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided; *And provided further*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal; *And provided further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.'

"Sec. 18. *And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight

or fare with said road, and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided; and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

Texas Pacific Railroad Act.

March 3, 1871, *Vol.* 16, *p.* 573.

AN ACT to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes.

"Be it enacted, etc., That John C. Fremont,.....
....
and all such persons as shall or may be associated with them, and their successors, are hereby created a body politic and corporate in fact and in law, by the name, style, and title of the Texas Pacific Railroad Company, and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and use a common seal; and the said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, county of Harrison, state of Texas; thence by the most direct and eligible route, to be determined by said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona, to a point on the Rio Colorado, at or near the southeastern boundary of the state of California; thence by the most direct and eligible route to San Diego, California, to ship's channel, in the bay of San Diego, in the state of California, pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude, and is hereby

vested with all the powers, privileges, and immunities necessary to carry into effect the purposes of this act."

"Sec. 9. That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line may be adopted by said company, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall *not have* been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied, or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named; and not including the reserved numbers. If, in the too near approach of the said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections nearest the line of said railroad may be selected as above provided; and the word 'mineral,' where it occurs in this act, shall not be held to include iron or coal. *Provided, however*, that no public lands are hereby granted within the state of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the lands originally granted. The term 'ship channel,' as used in this bill, shall not be construed as conveying any greater right to said company to the water front of San Diego Bay than it may acquire by gift, grant, purchase or otherwise,

except the right of way, as herein granted. *And provided further,* that all such lands, so granted by this section to said company, which shall not be sold or otherwise disposed of, as provided in this act, within three years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be fixed by and paid to said company, not exceeding an average of two dollars and fifty cents per acre for all the lands herein granted."

"Sec. 12. That whenever the said company shall complete the first and each succeeding section of twenty consecutive miles of said railroad and put it in running order as a first class road in all its appointments, it shall be the duty of the Secretary of the Interior to cause patents to be issued conveying to said company the number of sections of land opposite to and coterminous with said completed road to which it shall be entitled for each section so completed. Said company, within two years after the passage of this act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories, and twenty miles within the State of California, to be withdrawn from pre-emption, private entry, and sale; *Provided, however,* That the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, and the amendments thereto, shall be, and the same are hereby, extended to all other lands of the United States on the line of said road when surveyed, except those hereby granted to said company.

"Sec. 13. That the president of the company shall annually, by the first day of July, make a report and file it with the Secretary of the Interior, which report shall be under oath, exhibiting the financial situation of the company, the amount of money received and expended, and the number of miles

of road constructed each year; and further; the names and residences of the stockholders, of the directors, and of all other officers of the company, the amount of stock subscribed, and the amount thereof actually paid in, a description of the lines of road surveyed and fixed upon for construction, the amount received from passengers and for freight, respectively, on the road, a statement of the expenses of said road and its fixtures, and a true statement of the indebtedness of said company and the various kinds thereof."

"Sec. 23. That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company, of California, by the act of July twenty-seven, eighteen hundred and sixty-six; *Provided, however,* that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

Amendment to Texas Pacific Act Approved May 2, 1872.

"An Act supplementary to an Act entitled 'An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,' approved March third, eighteen hundred and seventy-one.

"*Be it enacted, etc.,* That the name, style and title of the Texas Pacific Railroad Company shall hereafter be 'The Texas and Pacific Railway Company;' and the said The Texas and Pacific Railway Company shall have, possess, and enjoy all the rights, privileges, and franchises heretofore conferred upon the said Texas Pacific Railroad Company."

Texas Pacific Forfeiture Act Feb'y 28, 1885.

"An Act to declare a forfeiture of lands granted to the Texas Pacific Railroad Company, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all lands granted to the Texas Pacific Railroad Company under the act of Congress entitled 'An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes,' approved March third, eighteen hundred and seventy-one, and acts amendatory thereto, be and they are hereby declared forfeited, and the whole of said lands restored to the public domain and made subject to disposal under the general laws of the United States, as though said grant had never been made; *Provided*, that the price of lands so forfeited and restored shall be the same as heretofore fixed for the even sections within said grant.

"Sec. 2. That the act of March third, eighteen hundred and seventy-five, entitled 'An act for the relief of settlers within railroad limits,' is hereby repealed.

"Approved, February 28, 1885."

Table of Dates and References to Record.

March 3, 1871...Congressional grant to Texas Pacific Railroad Company; afterwards changed to the Texas and Pacific Railway Company, from Marshall, Texas, via El Paso, crossing the Colorado river at the southeast corner of California; thence to ship's channel in the Bay of San Diego, Cal., which grant in California was the odd sections for twenty miles on each side of the road as granted lands, and with right to indemnity within a limit of thirty miles, but in case of the too near approach to the boundary of Mexico lands could not be selected immediately on the line of the road, then within a further

limit of forty miles from the line of road. (See appendix).

March 3, 1871... Section 23 of the above act authorized the Southern Pacific Railroad Company to construct a railroad from Tehachapi pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company by the act of July 27, 1866, but expressly providing that "this section shall in no way affect or impair the rights, present or prospective, * * * of any other railroad company." (See appendix).

April 3, 1871.... Southern Pacific Company filed map of *general route* from Tehachapi pass, via Los Angeles, to Colorado river at Fort Yuma (record 1360, 1363).

August 15, 1871. Texas Pacific Railroad filed in Interior Department map of general route from El Paso, Texas, to ship's channel, San Diego (Record 1545, 1546, 1548), by the direct route.

Sept. 27, 1871.... Interior Department withdrew and reserved the odd sections within 20 miles of Texas Pacific route between the Colorado river and Bay of San Diego (record 1539, 1540, 1542), and the withdrawal map as filed in the U. S. Land Office of Los Angeles, Cal., on Oct. 15, 1871 (record 1542).

May, 1874.....The Texas Pacific Railroad Company, surveyed, located and adopted for construction the line of railroad from the Colorado river via San Gorgonio pass to San Diego (report of Chief Engineer Dodge, record 1891, 1900, 1903, 1909; also map showing this line on file in the office of the company record 2055, 2073, 2074; also map showing said line with 20, 30 and 40-mile limits thereof, drafted for complainants by Samuel G. Bennett, and prepared from maps of the company and official reports—record 2093, 2098).

July 1, 1874.....Texas Pacific Railroad Company reports, under oath, to Interior Department description of the lines of route surveyed and fixed upon for construction, including a particular description of the line of route between Forth Worth, Texas, and San Diego (record 1761, 1766, 1770).

June 30, 1876....Map of Texas Pacific Railway filed in the Interior Department with the annual report of that company, showing the main line of road from a point in Texas, via Fort Yuma on the Colorado river; thence to San Diego via the San Gorgonio pass (record 1772, 1774).

Jan. 17, 1878....Southern Pacific Railroad Company files in Interior Department, with the report of commissioners appointed to examine the constructed railroad, its map of definite location from San Bernardino to the Colorado river at Fort Yuma (record 1422, 1423, 1440; also answer of Southern Pacific, record 280). In the stipulation of counsel regarding the printing of the record, it is stipulated that this map of the "5th section of

the Southern Pacific Railroad *as located* and constructed, filed with the Secretary of the Interior, with the commissioners' report upon said section on January 17, 1878," shall not be printed unless required, but shall accompany the record as an original document (record 2431, 2432).

Feb. 28, 1885....Act of Congress forfeiting the lands granted to the Texas Pacific Railroad Company and restoring the same to the public domain.

Nov. 2, 1885....Decision of Lamar, Secretary of the Interior, supported by opinion of Assistant Attorney General, adjudging that lands reserved for Texas Pacific Railroad were excepted from grant to Southern Pacific Railroad (record 1549, 1559).

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

SOUTHERN PACIFIC RAILROAD COMPANY et al., appellants,
v.
THE UNITED STATES, appellee.
No. 190.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

APPENDIX TO BRIEF FOR UNITED STATES.

CONTAINING AN ABSTRACT OF THE DECISIONS OF THE INTERIOR DEPARTMENT, THE SUPREME COURT, AND UNITED STATES CIRCUIT COURT OF APPEALS, CONSTRUING THE PROVISO OF SECTION 23 OF THE ACT OF CONGRESS OF MARCH 3, 1871, HOLDING THAT LANDS SET APART AND RESERVED FOR EITHER THE TEXAS PACIFIC RAILROAD OR ATLANTIC AND PACIFIC RAILROAD WERE LANDS TO WHICH SUCH COMPANY HAD A *PRESENT* OR *PROSPECTIVE RIGHT* AND CAN NOT BE TAKEN BY THE SOUTHERN PACIFIC COMPANY UNDER ITS GRANT OF MARCH 3, 1871.

Case of Texas Pacific Railroad and Southern Pacific Railroad (4 L. D., 215, 217, 218, 220).

OPINION.

Assistant Attorney-General Montgomery to Secretary Lamar.

[November 2, 1885.]

[Extracts from opinions.]

"At the time the Southern Pacific Company was seeking to procure the grant provided for in section 23

of said act [of March 3, 1871], the possibility of a forfeiture of its grant by the Texas Pacific was well known to said Southern Pacific Company. Hence, according to the above rule of construction, if said section 23 of said act is so worded as to leave it uncertain whether the lands now in question passed to the Southern Pacific, or whether in the event of a forfeiture by the Texas Pacific—just such as has taken place—it was intended that said lands should revert to the Government, all such uncertainty must be resolved in favor of the Government.

"It will be observed that the first and chief object of the above-named act (of March 3, 1871) was to secure the building of a railroad from Marshall, Texas, to the Bay of San Diego, California; and secondly, to connect said railroad, when built, with the city of San Francisco. And it appears, from appellant's own showing, that, although a map of general route of said Texas Pacific Railroad was filed in the General Land Office, yet not a mile of said road was ever built, nor was its line of definite location ever established. So that not only was it impossible for the Southern Pacific road to establish a connection between said road and the city of San Francisco (the very thing which the Southern Pacific Company was required to do, as the condition and in consideration of its grant), but it was impossible for the said last-named company, in the absence of a definite location of the line of said Texas Pacific road, either to connect therewith or to know at what point such connection could even prospectively be made."

* * * * *

"In view of the fact that, without any fault of the Government, it became impossible for the Southern Pacific to establish a railroad connection between the

city of San Francisco and said Texas Pacific road 'at or near the Colorado River,' the accomplishment of which work, as suggested above, constituted the very condition upon which its right to a grant was seemingly made to depend, it might be a serious question whether or not, in the absence of Congressional relief, said Southern Pacific Company is in a position to demand an acre of the land originally intended to be granted. According to the general doctrine pervading the law of dependent contracts, an impossibility to perform the conditions of such a contract will not excuse nonperformance when such impossibility is occasioned either by the act of God or a stranger. (See 2 Chitty on Contracts, 9th English edition, p. 1086.)"

"As we have seen, the closing words of said section 23 of the act above quoted—the section under which the Southern Pacific Company claims the lands in question—are as follows:

"'*Provided, however, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Company, or any other railroad company.*'

"Now, in view of the fact that this same act, in its preceding sections, had already declared that the 'Texas Pacific' was thereby constituted an incorporated railroad company, and was granted certain lands, including *all* the odd-numbered sections now in dispute, it is difficult to see how it would have been possible more clearly to except said lands from the operation of said grant to the Southern Pacific, than by providing that the latter grant should not 'affect or impair the rights, present or prospective, of any other railroad company.'"

DECISION.

Secretary Lamar to Commissioner Sparks, November 2, 1885.

"In the matter of the appeal of the Southern Pacific Railroad Company from your office decision of April 4, 1885, directing the local officers at Los Angeles, California, to be governed by instructions of March 17, 1885, directing them to give notice of the restoration of all lands theretofore withdrawn for the Texas and Pacific Railway, and revoking your office letter of March 18, 1885, excluding from such restoration lands along the branch line of the Southern Pacific Railroad, where the same passes through lands withdrawn from said Texas and Pacific Railway, I have carefully considered the points presented by said appeal, and, for the reasons set forth in the foregoing opinion, the said decision appealed from is hereby affirmed."

Gordon v. *Southern Pacific Railroad Company* (5 L. D., 691, 693).

Acting Secretary Muldrow to Commissioner Sparks, June 7, 1887.

"In the case of the *Texas Pacific Railroad Company and Southern Pacific* (branch line) *Railroad Company* (4 L. D., 215), this Department had occasion to consider the effect of the proviso above quoted from section 23 of the act of 1871.

"In the opinion of the Assistant Attorney-General in that case, which opinion was adopted by the Department, the following language was used relative to said proviso:

"'It is difficult to see how it would have been possible more clearly to except said lands from the operation of said grant to the Southern Pacific than by providing that the latter grant should not affect or

impair the right, present or prospective, of the Atlantic and Pacific Company or any other railroad company.'"

"What was there said is fully applicable to the branch of this case now under consideration, and to the tract in question. The SE. ¼ of SW. ¼ of sec. 23, if not within the exterior boundaries of the Azusa rancho, was embraced within the indemnity withdrawal for the Atlantic and Pacific Company, and gave to that company a prospective right which excepted the tract from the Southern Pacific grant."

Coble v. *Southern Pacific Railroad Company* (6 L. D., 679, 680).

Acting Secretary Muldrow to Acting Commissioner Stockslager, January 11, 1888.

"But the records of your office show that said tract is also within the 30 miles, or indemnity limits, of the grant of July 27, 1866 (14 Stat., 292), to the Atlantic and Pacific Railroad Company as ascertained by the map of designated route filed March 12, 1872, on which withdrawal was ordered April 22, 1872.

"By the twenty-third section of the act of March 3, 1871, *supra*, making the grant to the branch line of the Southern Pacific Company, it was provided: 'That this section shall in no way affect or impair the right, present or prospective, of the Atlantic and Pacific Company, or any other railroad company.'

"In the case of *Gordon* v. *Southern Pacific Railroad Company* (5 L. D., 691) it was held that, under this proviso, land 'embraced within the indemnity withdrawal for the Atlantic and Pacific Company * * * gave to that company a prospective right, which excepted the tract from the Southern Pacific grant.'

"Under this decision it is apparent that the tract in

question did not pass under the grant to the Southern Pacific Company, but was excepted therefrom because of the grant to the Atlantic and Pacific Company."

Coble v. *Southern Pacific Railroad Company* (6 L. D., 812, 813, 814, 815).

(On review.)

Secretary Vilas to Commissioner Stockslager, June 23, 1888.

"Counsel argue this motion as if it was a question between the roads as to when their respective rights attached under their grants, but in the case now under review the decision of the Department was based upon the ground that the Atlantic and Pacific Company, having the right to locate and construct its line along the route, they therefore had a prospective right to select lands that fell within the limits of the road as afterwards located, and hence the Southern Pacific Railroad Company had no right to the same, because the lands of the character of the tract in controversy were excepted from the operation of the grant to the Southern Pacific Company (branch line), by the proviso above referred to, and hence the forfeiture of the grant to the Atlantic and Pacific Company did not invest the Southern Pacific Company with the right to lands that were excepted from the operation of their grant, following the decision of the Department in the case of *Gordon* v. *Southern Pacific Company* (5 L. D., 691).

"In the *Gordon case* it was held, upon the authority of the Assistant Attorney-General in the case of the *Texas Pacific Railroad Company and Southern Pacific* (branch line) *Railroad Company* (4 L. D., 215), that:

"'Under section 23 of the grant of March 3, 1871, lands embraced within the indemnity withdrawal for

the Atlantic and Pacific were *excepted* from the grant to the Southern Pacific Railroad Company.'

"In that case the lands in controversy were within the granted limits of the Southern Pacific Railroad Company, as shown by the map designating the route of said road filed April 3, 1871, and within the indemnity limits of the Atlantic and Pacific Railroad Company as shown by the map of said road filed March 12, 1872, and hence they were in precisely the same condition, so far as they were affected by the grants to said roads as the lands involved in this case.

"On March 2, 1888, this Department submitted to the Attorney-General, for his opinion thereon, the following question:

"'Whether the proviso to the twenty-third section of the act of the 3d of March, 1871 (16 Stat., 573), excepted from the operation of said grant lands within the primary limits of said road, where said lands fall also within the primary or indemnity limits of the Atlantic and Pacific Railroad Company now forfeited, and whether said lands can be restored to settlement and entry under the general land laws?'

"The opinion of the Attorney-General has been filed in the Department, in which he holds that:

"'This section constitutes the grant of all the rights the Southern Pacific Railroad Company has to public lands for the branch line described in it. No subsequent legislation has either added to or diminished the rights of that company. Whatever rights the company had along the main line of its road under the act of July 27, 1866, are extended to this branch line, subject to the same limitations, restrictions, and conditions that are attached to it in the original grant, with the additional exception stated in the proviso. By that

proviso all rights and privileges that would in 'any way affect or impair the rights, present or prospective,' of the Atlantic and Pacific Railroad Company are excepted by the enactment from the grant to the Southern Pacific Company, and as to any such right or privilege thus excepted, no claim of any kind was ever vested in the Southern Pacific Company. The rights that were granted to the Atlantic and Pacific Railroad Company in their full breadth, as set forth in the act of July 27, 1866, are excepted by the proviso. The exception includes all the rights, both present and prospective, of the Atlantic and Pacific Company. The rights excepted are those which on the 3d of March, 1871, *existed*, and those which the legislation as it then stood *promised* to the Atlantic and Pacific Company.'

"Without stopping to consider the question as to whether or not this construction given to the said twenty-third section of the act of March 3, 1871, by my predecessor and the Attorney-General is the correct one, and because the determination is open to judicial review, I believe that the ends of justice can be best subserved by leaving said company to seek in the courts its remedy for any possible injury it may have sustained in the premises. I therefore decline to disturb the former ruling of the Department, and the motion for review is accordingly denied."

Southern Pacific Railroad Co. v. *Moore* (11 L. D., 534).

Secretary Noble to the Commissioner of the General Land Office, November 29, 1890.

"The land selected is within the indemnity limits of the grant of March 3, 1871 (16 Stats., 579), to the branch line of the Southern Pacific Railroad Company, as shown by its map of designated route filed April 3,

1871, and also within the primary limits of the grant of July 27, 1866 (14 Stats., 292), to the Atlantic and Pacific Railroad Company, as shown by its map of designated route filed March 12, 1872.

"This Department, in construing this section, has repeatedly held that lands within the grant to the Atlantic and Pacific Company do not pass under the grant to the Southern Pacific Company, but are excepted therefrom. *Gordon* v. *Southern Pacific Railroad Company* (5 L. D., 691); and *Coble* v. *Southern Pacific Railroad Company* (6 L. D., 679), which on review was adhered to (6 L. D., 812).

"The act of July 6, 1886 (24 Stat., 123), forfeits and restores to the public domain certain lands within the primary and indemnity limits of the Atlantic and Pacific Company, adjacent to and coterminous with the uncompleted portions of its road. The land in contest is part of the land forfeited under this act, but the forfeiture confers no right upon the Southern Pacific Railroad Company to make selection of land never embraced in its grant."

Moore v. *Kellogg* (17 L. D., 391, 393).

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 5, 1893.

"But this land was within the primary limits of the grant to the Atlantic and Pacific Railroad Company under the act of July 27, 1866 (14 Stat., 292), as shown by its map of definite route, filed March 12, 1872, and for this reason was not subject to selection as indemnity land for the Southern Pacific Railroad Company under its grant made by act of Congress of March 3, 1871 (16 Stat., 579).

"In the case of the *United States* v. *Southern Pacific*

Railroad Company (146 U. S., 570), the Supreme Court, speaking through Justice Brewer, says:

"'Our conclusions, therefore, are that a valid and sufficient map of definite location of its route from the Colorado River to the Pacific Ocean was filed by the Atlantic and Pacific Company, and approved by the Secretary of the Interior; that by such act the title to these lands passed, under the grant of 1866, to the Atlantic and Pacific Company, and remained held by it subject to a condition subsequent until the act of forfeiture of 1886; that by that act of forfeiture the title of the Atlantic and Pacific was retaken by the General Government, and retaken for its own benefit, and not that of the Southern Pacific Company; and that the latter company has no title of any kind to these lands.'

"It will thus be seen that the act forfeiting these lands of the Atlantic and Pacific Railroad Company did not give the Southern Pacific Company any rights to the land within the indemnity limits, but the land reverted to the Federal Government, and after the said act was passed became open to settlement; and as the record shows that Mattie Moore made her application to file upon said land now in issue, together with other land, on August 10, 1888, at which time the land was opened to settlement, it follows that she has the prior right to it.

"As the Southern Pacific Railroad Company has no legal rights in the land, Kellogg could acquire none by reason of his application to purchase from it."

Union Oil Co. v. *Southern Pacific Railroad* (26 L. D., 48).

Secretary Bliss to Commissioner of the General Land Office, January 18, 1898.

"November 22, 1897, the Department, on the application of the Southern Pacific Railroad Company,

issued an order (25 L. D., 393), directing your office to suspend action upon that part of departmental decision of November 6, 1897, on review (25 L. D., 351), relating to the question of the right of the Southern Pacific Railroad Company to make indemnity selections within the forfeited primary limits of the Atlantic and Pacific grant. The purpose of this order of suspension was to withhold action upon that particular portion of said departmental decision of November 6, 1897, during the pendency, in the Supreme Court, of proceedings to obtain a rehearing and reconsideration of a prior decision therein, upon which the departmental decision now in question was based.

"Since the issuance of said order of suspension the Southern Pacific Railroad Company has presented to the Supreme Court its petition for rehearing in the case named, and that petition has been considered and denied, so that the decision of the court cited in the departmental decision has now become final. The said order of suspension of November 22, 1897, is hereby revoked, and the application of the Southern Pacific Railroad Company, which was therein treated as a motion for re-review, is hereby denied."

Southern Pacific Railroad (26 L. D., 697, 699).

Commissioner Hermann to register and receiver of Los Angeles, approved by Secretary Bliss, May 3, 1898.

"The Supreme Court of the United States has finally decided that the lands lying within the overlapping limits of the grant by act of Congress of March 3, 1871 (16 Stat., 573), to the Southern Pacific Railroad Company, branch line, and the forfeited portion of the grant by act of July 27, 1866 (14 Stat., 592), to the Atlantic and Pacific Railroad Company, are public

lands and that the Southern Pacific Railroad Company has no right therein under said grant of 1871 (*Southern Pacific Railroad Co. et al.* v. *United States*, 168 U. S., 1); and the Secretary of the Interior, by letters of January 18 and 28, 1898 (26 L. D., 48 and 97), has directed that the restoration to entry of the lands which had been directed to be restored by departmental letter of July 15, 1893, but was suspended by departmental letter of November 8, 1893, because of the pendency of the suit now decided, be proceeded with, certain lands being excepted.

"Therefore, in order to carry the restoration into effect, you will cause to be published for the period of thirty days, in some newspaper of general circulation in your district and in the vicinity of the lands, a notice that all lands lying within the overlapping limits of the Atlantic and Pacific Company's grant by act of July 27, 1866, and the Southern Pacific branch line grant by act of March 3, 1871, and not within the 20-mile primary limits of the grant by the former act to the Southern Pacific Company for its main line, heretofore reserved from entry for the Southern Pacific Company, are restored to the public domain, with the exceptions and additions to be noted further on, and will be subject to entry on a day to be fixed by the notice, which shall not be less than thirty days from the date of the first publication thereof.

"I transmit a diagram showing the limits of the said grants as they overlap the lands to be restored, and in explanation thereof will say that under the decision of the court the restoration will embrace all the public lands within the 30-mile limits of the forfeited Atlantic and Pacific grant to the extent it is overlapped by the Southern Pacific branch line grant (both 20 and 30

mile limits) outside the 20-mile primary limits of the Southern Pacific main line grant, and also the tracts above described within said latter limits as being involved in the suit recently decided, with the exceptions noted.

"The lands outside the primary limits of the Southern Pacific main line grant, and within the limits of its branch line grant, are of four classes, as follows: Lands within the common granted limits of the Atlantic and Pacific grant and the Southern Pacific grant of 1871; lands within the granted limits of said Southern Pacific grant and the indemnity limits of the Atlantic and Pacific grant; lands within the granted limits of the Atlantic and Pacific grant and within the indemnity limits of the Southern Pacific grant, and lands within the common indemnity limits of both grants. The San Gabriel Reservation is noted on the diagram and colored pink.

"All applications to select and all selections by the Southern Pacific Railroad Company on account of its branch line, of the lands to be restored, are rejected and canceled, respectively, and you will so note upon your records."

Smead v. *Southern Pacific R. R. Co.* (29 L. D., 135, 137).

Acting Secretary Ryan to Commissioner of General Land Office, August 25, 1899.

"On April 15, 1898 (26 L. D., 697), instructions were issued to the local officers at Los Angeles, Cal., relative to the proper manner of carrying into effect said order of restoration. With said instructions was transmitted a diagram showing the limits of the said grants as they overlap the lands to be restored, and in explanation thereof it was said that—

"'Under the decision of the court the restoration will embrace all the public lands within the 30-mile limits of the forfeited Atlantic and Pacific grant to the extent it is overlapped by the Southern Pacific branch-line grant (both 20 and 30 mile limits) outside the 20-mile primary limits of the Southern Pacific main-line grant, and also the tracts above described within the latter limits as being involved in the suit recently decided, with the exceptions noted.'

"The lands outside the primary limits of the Southern Pacific main line grant, and within the limits of its branch line grant, are of four classes, as follows: Lands within the common granted limits of the Atlantic and Pacific grant and the Southern Pacific grant of 1871; lands within the granted limits of said Southern Pacific grant and the indemnity limits of the Atlantic and Pacific grant; lands within the granted limits of the Atlantic and Pacific grant and within the indemnity limits of the Southern Pacific; and lands within the common indemnity limits of both grants. The San Gabriel Reservation is noted on the diagram and colored pink.

"All applications to select, and all selections by the Southern Pacific Railroad Company on account of its branch line, of the lands to be restored, are rejected and canceled, respectively, and you will so note upon your records.

"The lands referred to as being excepted from restoration are the lands involved in the suit decided by the United States Supreme Court (168 U. S., 1, *supra*) which were claimed by defendants in that suit other than the Southern Pacific Railroad Company, and the trustees of a certain mortgage executed by that company, and the lands lying within the San Gabriel tim-

ber-land reserve, all of which are specifically noted in said instructions.

"The land here in controversy, being situated within the common indemnity limits of the grant to the Atlantic and Pacific Company, and that to the Southern Pacific Company branch line, and not within the exceptions referred to, are within the said instructions as a part of the restored lands. The departmental decision of November 22, 1895, holding intact the company's selection of the same, was therefore erroneous, and is hereby set aside and vacated; your office decision of August 1, 1894, is reversed; and appropriate action will be taken upon Smead's application in accordance with this decision."

United States v. *Colton Marble and Lime Co.*, and *United States* v. *Southern Pacific Railroad Co.* (146 U. S., 615, 619).

[Decided December 12, 1892.]

"One thing which distinguishes the grant of 1871 to the Southern Pacific Railroad Company from most, if not all other, land grants is the proviso somewhat considered in the opinion in the former cases, and which reads:

"'*Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company.'

"What is the significance of this proviso? Without it, certainly, the Southern Pacific, its grant being of later date, would be postponed to the Atlantic and Pacific; and on the filing by each company of a map of definite location, the title to the lands within the granted limits would vest in the Atlantic and Pacific

Company, to the total and absolute exclusion of all claims on the part of the Southern Pacific. The proviso, therefore, was without significance in respect to such lands. It in no manner strengthened the title of the Atlantic and Pacific, and took nothing away from the Southern Pacific. Yet it can not be supposed that this proviso was meaningless, and that Congress intended nothing by it. Carefully inserted, in a way to distinguish this grant from ordinary later and conflicting grants, it must be held that Congress meant by it to impose limitations and restrictions different from those generally imposed in such cases, and it in substance declared that the Southern Pacific Company should not in any event take lands to which any other company had at the time a present or prospective right."

Southern Pacific Railroad Co. v. *United States* (168 U. S., 1, 45, 46, 66).

[Decided October 18, 1897.]

"In the cases of *United States* v. *Colton Marble and Lime Company* and *United States* v. *Southern Pacific Railroad Company* (146 U. S., 615) it was adjudged that the proviso in the act of March 3, 1871, c. 122, 16 Stat., 573 (giving lands in aid of the construction of the Southern Pacific Railroad), that the grant should 'in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company,' operated to except the indemnity lands of the Atlantic and Pacific Company from the grant to the Southern Pacific Company."

"The lands now in controversy are situated opposite to and are coterminous with the first, second, and fourth sections of the Southern Pacific Railroad as constructed between 1873 and 1877, inclusive, and

within the primary and indemnity limits of the grant to the Southern Pacific Railroad Company made by the twenty-third section of the Texas and Pacific act of March 3, 1871, the 61,939.62 acres patented to that company being opposite to the first and fourth sections of its road. It may be said that the lands here in dispute belong to one or the other of the following classes: Lands within the common granted limits of both the Atlantic and Pacific grant of 1866 and the Southern Pacific grant of 1871; lands within the granted limits of the Southern Pacific grant and the indemnity limits of the Atlantic and Pacific grant; lands within the Southern Pacific indemnity limits and the Atlantic and Pacific granted limits; lands within the common indemnity limits of both grants. Of those in dispute 219,012.93 acres have not been surveyed by the United States.

"The result is that the decree must be affirmed in all respects as to the Southern Pacific Railroad Company, as well as to the trustees in the mortgage executed by that company, and affirmed also as to the other defendants, subject, however, to the right of the Government to proceed in the circuit court to a final decree as to those defendants, and it is so ordered."

Southern Pacific Railroad Co. v. *United States* (United States Circuit Court of Appeals, 109 Fed., 913, 916, 917).

[Decided May 20, 1901.]

"The grant to the Southern Pacific Railroad Company is made in section 23 of this act, which reads as follows:

"'That for the purpose of connecting the Texas Pacific Railroad with the City of San Francisco, the

Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company.'

"The record shows that the Texas Pacific Railroad Company, on August 15, 1871, filed a map of its general route from a point in Texas to the bay of San Diego, showing the line of route designated as the 'direct line;' that the Southern Pacific Railroad Company, on April 3, 1871, filed a map of its general route from Tehachapa Pass, via Los Angeles, to the Colorado River at a point near Yuma.

"Had the Texas Pacific Railroad Company, or any other railroad company, acquired any present or prospective right to any of the lands embraced in this suit at the time the grant was made by the Government to the Southern Pacific Railroad Company, March 3, 1871? The answer to this question will dispose of the appeal taken herein by the Southern Pacific Company, and will be found in the opinion of the court in *United States* v. *Colton Marble and Lime Co.* (146 U. S. 615; 13 Sup. Ct., 163; 36 L. ed., 1104). It is true that in that case the court confined itself to the conflicting claims of the Southern Pacific and the Atlantic and Pacific Company; but, by reference to the provisos in the grant to the Southern Pacific, it will be seen that it also

includes 'present or prospective' rights of 'any other railroad company;' and it therefore necessarily follows that the views expressed by the Supreme Court in that case apply with equal force to the conflicting claims, if any, between the Southern Pacific and the Texas Pacific, because whatever rights the Texas Pacific Company ever acquired to any of the lands in question continued to exist until the act of forfeiture passed by Congress February 28, 1885, and as long before that time the Southern Pacific Company had built the road it was authorized to construct, and filed in the General Land Office maps showing its definite location, it necessarily follows that if at the latter date the lands in suit, or any of them, were for any reason reserved, or were lands to which the Texas Pacific Company had acquired a present or prospective right, such lands did not pass to the Southern Pacific Company under its grant. For as to such lands the Texas Pacific Company certainly had a 'prospective,' if it did not have a 'present right.' Inasmuch as the grants to the Southern Pacific and Texas Pacific Railroad companies were given by the same act, and of the same date, the ordinary and usual rule would be to give each of said companies one-half of such lands as were within both grants. But the case under consideration is taken out of the ordinary rule by the proviso annexed to the grant to the Southern Pacific Company."

The foregoing extracts from the opinions in the cases above mentioned are respectfully submitted.

JOSEPH H. CALL,
Special United States Attorney.

MARCH 3, 1903.